



The National Association of State Departments of Agriculture (NASDA)
1156 15th Street, N.W., Suite 1020
Washington, D.C. 20005
(202) 296-9680
www.nasda.org
Stephen Haterius, Executive Director

November 8, 2010

Water Docket

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW,

Mail code: 28221T

Washington, DC 20460

Re: EPA-R03-OW-2010-0736 (Draft Chesapeake Bay Total Maximum Daily Load)

To whom it may concern:

The National Association of State Departments of Agriculture (NASDA) respectfully submits the following comments related to EPA's Draft Chesapeake Bay Total Maximum Daily Load (Docket Number EPA-R03-OW-2010-0736), released for public comment on September 24, 2010.

NASDA represents the commissioners, secretaries, and directors of the state departments of agriculture in all fifty states and four U.S. territories. State departments of agriculture are responsible for a wide range of programs including food safety, combating the introduction and spread of plant and animal diseases, and fostering the economic vitality of our rural communities. Conservation and environmental protection are also among our chief responsibilities.

State agriculture departments are at the forefront of efforts in the region to address water quality in the Chesapeake Bay. Our members in the Chesapeake region—and nationwide—are committed to addressing water quality, and other environmental challenges, in an effective and responsible manner. Even though nonpoint issues are not easy to resolve, substantial progress has been made. The remaining challenges associated with improving water quality in the Bay are complicated and require innovative solutions. NASDA and our members in the region are committed to working with stakeholders to do just that.

NASDA's concerns with the Draft TMDL fall into two broad categories: (1) the national implications associated with EPA's acknowledgement that the agency's approach for the Chesapeake Bay and Draft TMDL will be replicated in other watersheds across the country and (2) concerns regarding the development process of the Draft TMDL and its implications on agricultural producers in the six Chesapeake Bay states. While these comments focus largely on our specific concerns with elements of the Draft TMDL, NASDA is very concerned about the potential national ramifications this draft could have on national water policy. EPA has made numerous direct connections between its current activities in the Chesapeake Bay, and its desire to implement similar strategies in other watersheds. In fact, in the August 2010 draft Strategy for Achieving Clean Water, the agency emphasized that, *"Success in cleaning up the Chesapeake*

Bay watershed will be a model for watershed protection in other parts of the country.” We are particularly concerned about elements of the Draft TMDL, as well as other related activities of the agency, that undermine state authority and responsibilities under the Clean Water Act.

There are five reasons, outlined below that we believe require EPA to reissue the Draft after reevaluating the rationale, data and/or authority for its proposed actions. Any one of the reasons is sufficient to question the validity of the EPA action to publish the rule as the agency has. The comments below reflect many of the same concerns expressed by a significant number of both national and local agricultural stakeholders. NASDA shares the concerns of the agricultural community and provides the following comments to express the serious concerns state regulators—from across the country—have with the Draft TMDL:

- Agriculture and Forestry, through state programs as well as other voluntary, incentive based programs, have made and continue to make significant contributions to improvements to water quality in the Chesapeake Bay that are not given credit in EPA’s model.
- EPA has failed to provide meaningful public review of the Draft TMDL by having failed to be transparent regarding its data.
- The Draft TMDL is arbitrary and capricious as it is based on inputs the EPA has acknowledged are flawed.
- The Draft TMDL is contrary to existing law.
- The Draft TMDL, if actually implemented, would result in substantial and widespread economic and social impact that is not necessary to attain realistic goals.

State agriculture departments are at the forefront of efforts in the region to address water quality in the Chesapeake Bay. Our members in the Chesapeake region —and nationwide—are committed to addressing water quality, and other environmental challenges, in an effective and responsible manner. In the Chesapeake Bay watershed, agriculture and forestry producers are among those who have made possible the significant reductions in nutrient and sediment loadings to the Chesapeake Bay that has occurred over the past 25 years. Even EPA’s data show that since 1985 the agriculture community has reduced phosphorus loadings by over 21 percent, nitrogen loadings by over 27 percent, and sediment loadings by over 24 percent from 1985.¹ However, EPA’s models do not account for many agricultural and forestry practices that are currently being employed in the Chesapeake Bay Watershed to protect water quality. Thus, the Draft TMDL fails to acknowledge the success that has been achieved in the Bay by the

¹ See EPA Presentation at the September 29, 2010 public meeting on the Draft TMDL in the District of Columbia, at 23-25 (available at http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/dcpblicmeetingrakmods.pdf).

efforts of the agricultural community and others. It is imperative that the watershed jurisdictions be afforded wide latitude in issuing TMDLs for nutrients and sediment that accurately reflect the tremendous progress that has been made and that build on that success, rather than having federal mandates imposed upon them. It is vital that EPA consider the benefits derived from agriculture and the risk of driving agriculture out of the watershed through this process.

EPA has failed to provide meaningful public review of the Draft TMDL. The Draft TMDL does not provide the public with information on the assumptions that have been made in the modeled scenarios that led to the TMDL allocations. Thus, EPA has not provided sufficient information for the public to provide meaningful comments under either the Administrative Procedures Act (APA) or the CWA. By not releasing this information, EPA also has made it difficult for policy-makers and the public to understand to what extent the Draft TMDL will have substantial and widespread economic and social impact, foreclosing a meaningful dialogue about the costs, benefits, and trade-offs among various policy choices.

In fact, the policy choices adopted in the Draft TMDL are all driven by sets of assumptions that were built in to various “scenarios” that were fed into a model called “Scenario Builder,” the output of which was then fed into the Chesapeake Bay Watershed Model (hereinafter “Watershed Model”). EPA turns the crank and determines if a certain scenario leads to a prediction that water quality standards will be met. If the answer is yes, then the assumptions that went into that scenario are elevated to the level of regulatory policy. Thus, in the Draft TMDL, the anonymous and unaccountable modelers who put together the various scenarios that are fed in to “Scenario Builder” are the people who are determining the regulatory controls that EPA is attempting to impose on the Chesapeake Bay watershed. This is not an appropriate way to make decisions that will cost billions of dollars.

EPA acknowledges that the “Chesapeake Bay TMDL is the largest, most complex TMDL in the country, covering a 64,000-square-mile area in seven jurisdictions.” Draft TMDL, at 2-7. EPA is proposing two separate sets of load allocations and waste load allocations for three pollutants in 92 water body segments. Thus, the Draft TMDL is, in fact, 552 TMDLs.

The allocations that make up the Draft TMDL are based on a version of the Chesapeake Bay watershed model (5.3) that has only been functional since June 2010. Parts of this model update were made available for public review on June 2, 2010. Other parts of this model are not available for public review. For example, scenario data and scenario results remain unavailable. In an October 15, 2010 letter to the agency, NASDA requested that EPA make available for public review the scenario data and scenario results that are the inputs and outputs of the “Scenario Builder” model that provides inputs to the Chesapeake Bay Watershed model. It is imperative that the agriculture community have access to the data and assumptions that are driving the agency’s policy choices in the Draft TMDL so that agricultural stakeholders are able to provide the agency meaningful comments during the comment period. On November 2,

2010 the agency released portions of this data and committed to providing the Scenario Builder code by the end of that week. While we appreciate EPA releasing portions of the requested data, it is unreasonable and unacceptable to expect stakeholders to determine if all of the data and Scenario Builder components requested were made available and to then evaluate the data and the Scenario Builder tool for the calibration as well as all of the scenarios used to develop the TMDL prior to the comment docket closing on November 8. Furthermore, EPA has admitted that its model is flawed and plans to make changes to the model in 2011. See letter dated June 11, 2010, from Shawn Garvin, Regional Administrator, EPA Region III, to the Principal's Staff Committee.

Even though EPA knows that its target loadings are inaccurate, EPA nevertheless has required (using threats of retaliatory actions) the six states in the Chesapeake Bay watershed and the District of Columbia to develop implementation plans for these inaccurate loadings in a very short period of time. The target loadings for phosphorus and sediment were provided on July 1, 2010. The target loadings for sediment were made available to watershed jurisdictions on August 13, 2010. EPA then demanded that watershed jurisdictions submit implementation plans based on these inaccurate loadings by September 1, 2010, allowing 62 days to develop plans for nutrients and only 19 days to develop plans for sediments, to implement what EPA acknowledges is the largest and most complex TMDL ever attempted.

By turning the TMDL program on its head and requiring implementation plans before the TMDL is issued, EPA is using that information to incorporate implementation measures into the Draft TMDL, even though implementation measures are not lawfully part of a TMDL. Thus, the TMDL that EPA made available for review on September 24, 2010, consists not only of wasteload and load allocations, but also consists of detailed implementation instructions directed at the watershed jurisdictions.

Adding implementation measures has only added to the complexity of the Draft TMDL. The Draft TMDL consists not only of the 370 pages of the Draft TMDL document, but also the 1672 pages of the 22 appendices, as well as the technical analysis and modeling information that is referenced throughout the Draft TMDL. We have not attempted to quantify the volume of that supporting information.

Despite its acknowledgement that the Draft TMDL is the most complex ever attempted, EPA is allowing only 45 days for public comment. Forty-five days is insufficient under the APA to provide for meaningful public comment. In its October 22, 2010, letter to Congressman Goodlatte and Congressman Holden, EPA bases its refusal to extend the comment period on the deadlines that the administration has imposed on itself through Executive Order 13508 and through a settlement agreement with Chesapeake Bay Foundation even though these are self-imposed deadlines.

The Draft TMDL is arbitrary and capricious. The TMDL allocations are based on data that EPA acknowledges is flawed. EPA acknowledges that the allocations are likely to be revised in 2011 when better data on the application and effectiveness of agriculture nutrient management plans and better data on the extent of impervious surfaces in suburban development are incorporated in the Chesapeake Bay watershed model. Yet, EPA plans to proceed to issue a TMDL that will have real regulatory consequences notwithstanding the fact that EPA knows that it is inaccurate. If EPA proceeds as planned, this final TMDL will make allocations to both point sources and nonpoint sources based on data that EPA knows are inaccurate. If EPA finalizes the Draft TMDL without first revising its modeling, that final agency action will be arbitrary and capricious under the APA.

We are very concerned that the inputs to EPA's Watershed Model do not accurately reflect pollutant loadings to the Chesapeake Bay. The inputs to EPA's Watershed Model are based on a stand-alone pre-processor called "Scenario Builder." Scenario Builder quantifies nutrient loads based on different assumptions and then allocates them spatially and temporally across the Chesapeake Bay watershed. This information is then fed into the Watershed Model and is used to allocate pollutant loadings to different sources and sectors.

Another concern is the failure of the model to account for agriculture BMPs. This issue is raised in many of the state watershed implementation plans (WIPs). Currently, only cost-shared BMPs are accounted for in the model, failing to account for voluntary and regulatory BMPs. While work is underway to identify and quantify BMPs that have been implemented outside of federal or state cost share programs, this is not yet complete. Until the model is able account for these agriculture BMPs, it is categorically inappropriate to use the model for anything other than an academic exercise.

The Draft TMDL is contrary to existing law. EPA is attempting to exceed its CWA authority in the Draft TMDL. In the Draft TMDL, EPA asserts that it has the authority to issue a TMDL over the objections of a watershed jurisdiction, even though it has not gone through the formal process set forth in the CWA of disapproving a state TMDL. In the Draft TMDL, EPA has disapproved state WIPs and is threatening to take action against watershed jurisdictions based on that disapproval, even though EPA has no authority to approve or disapprove WIPs. In the Draft TMDL, EPA is arrogating the authority to implement a TMDL by giving wasteload allocations to every source it can identify, including 1006 individual residences, even though EPA has no authority to implement a TMDL that requires reductions from both point sources and nonpoint sources to meet water quality standards.

Additionally, we object to the draft backstop allocations for agriculture operations. In particular, there are several concerns related to the management of animal feeding operations (AFO) as concentrated animal feed operations (CAFO) and imposing CAFO permitting requirements on all AFO's.

EPA's authority to designate AFOs as CAFOs is governed by 40 C.F.R. 122.23(c). However, that authority is limited. First, the AFO must actually discharge pollutants.² Second, either the state or the EPA Regional Administrator must first make a determination that the particular AFO "is a significant contributor of pollutants to waters of the United States." Third, if a state is authorized to carry out the CWA permitting program (which includes every watershed jurisdiction except for the District of Columbia) then the Regional Administrator may designate an AFO as a CAFO **only if** "the Regional Administrator has determined that one or more pollutants in the AFO's discharge contributes to an impairment of a downstream or adjacent State or Indian Country water that is impaired for that pollutant." 40 C.F.R. 122.23(c)(1). EPA will not be able to rely on its Watershed Model to make these determinations, because the model cannot predict water quality impacts at the individual facility level. Thus, EPA will have to develop site-specific data before it can make such a determination.

Notably absent from the regulation is the authority to designate an AFO as a CAFO because EPA does not agree with a state's WIP. Accordingly, EPA's claim (in both its backstop allocation and in its evaluation of state WIPs) to be able to broadly use residual designation authority against AFOs is invalid.

We are concerned about the significant economic impacts the Draft TMDL will have on agricultural producers in the Bay. Absent an assessment of the costs that will have to be borne by agricultural producers as the Draft TMDL is implemented, EPA should not proceed with issuing the TMDL. The Draft TMDL relied on E3 scenarios (Everything, by Everyone, Everywhere) to achieve the pollutant reductions called for in its backstop allocations even though EPA admits that the E3 scenario is not realistic and is not constrained by economic or technical feasibility. As a result, EPA has proposed pollutant reductions that are not realistic. In fact, EPA had previously determined that the water quality standards for the Chesapeake Bay were not attainable and a use attainability analysis (UAA) was needed. This action would have followed the recommendation of the National Research Council of the National Academy of Sciences in its 2001 report: "Assessing the TMDL Approach to Water Quality Management" (NAS 2001). In that report, the NAS recommended that states or EPA first determine whether water quality standards are attainable, before developing a TMDL. NAS 2001, at 94. Unfortunately, EPA abandoned its UAA for the Chesapeake Bay. By issuing a TMDL without going through this analysis, EPA will be issuing a TMDL that cannot meet water quality standards, and therefore cannot meet the requirements of the statute.

To date, for the Chesapeake Bay, EPA has only considered changes to water quality standards when modeling has showed the standards are not achievable even if EPA could turn the clock back to the 1600s and impose complete reforestation on the Chesapeake Bay watershed. However, EPA should allow watershed jurisdictions to look at economic and social feasibility as

² See *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486, 504 (2d Cir. 2005); *Service Oil, Inc v. EPA*, 590 F.3d 545 (8th Cir. 2009).

well. For example, the Draft TMDL would result in significant adverse impacts on agriculture production, with significant impacts on the availability of affordable food. For example, it is important that a watershed jurisdiction be able to decide that because achieving water quality standards for all three pollutants in all segments and at all times would cause substantial and widespread economic and social impacts, that instead water quality standards could be met in most areas most of the time with far less impact. This analysis is critical to the development of the Chesapeake Bay TMDL.

We urge EPA to withdraw its Draft TMDL, address the flaws in its modeling, and work with the states to develop TMDLs for the Chesapeake Bay Watershed that are attainable. Failure to do so will significantly impact the economic viability of agricultural producers in the bay and the rural communities which they support.

Sincerely,

A handwritten signature in black ink that reads "Stephen Haterius". The signature is written in a cursive, flowing style.

Stephen Haterius
Executive Director